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No. 85-440

In the Supreme Court of the United States

OCTOBER TERM, 1985

PHILADELPHIA ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

REPLY MEMORANDUM OF PHILADELPHIA ELECTRIC COMPANY IN SUPPORT OF PETITION FOR *A WRIT OF CERTIORARI*

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Philadelphia Electric Company ("PECO"), an investor owned public utility which was directly harmed by Exxon Corporation's ("Exxon") overcharges, files this Reply Memorandum to respond to the briefs filed by the United States and the "State Respondents" (collectively referred to as "the opposition") in opposition to the petitions.[1]

1. In addition to PECO, oil refiners, airlines, gasoline retailers, oil jobbers, truck operators, taxicab operators and motorists have petitioned this Court to review the decision of the District Court which authorizes diversion of the entire restitution fund (now estimated to be approximately $2 billion) to a small segment of the population. Nos. 85-430, 85-432 and 85-444.

The gross errors of law committed by the District Court as well as its departure from the accepted and usual course of judicial proceedings and the conflict between TECA and the Sixth and Eighth Circuits[2] makes review by this Court imperative. *See* Sup. Ct. Rule 17. Three points are made in Reply. First, the opposition misstates the record concerning PECO's intervention in the District Court. Second, the lower court's findings, stated and restated by the opposition, are hopelessly inconsistent and will be a dangerous precedent unless corrected by this Court. Finally, this case is of major significance both in the ongoing litigation under the price control regulations and in other bodies of law where restitutionary rights are implicated.

REASONS FOR GRANTING THE PETITION

POINT I

The opposition simply mischaracterizes the record when it contends that PECO never sought to present its claim to a portion of the restitutionary fund to the District Court. *See* States' Brief, at 25; United States' Brief, at 27. In its Motion to Intervene in the trial court, PECO alleged that it sought to intervene "to assert and protect [its] right to recover for overcharges of oil. . . ." *See* Appendix A hereto, at A-1. PECO alleged further that its "ability to protect [its] interests in the fund either in *this Court* [the district court] or on appeal . . ." would be impaired unless intervention was granted. *See id.* at A-2 (emphasis supplied). The District Court, not PECO, limited PECO's intervention to "purposes of appeal." The oppositions' arguments to the contrary are not supported by the record and must be rejected

Indeed, the District Court's curtailment of PECO's right to present its claim in a meaningful way is a significant factor in the denial of PECO's right to due process. *Matthews v.*

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2. *Compare* the decision of the Court below, 773 F.2d 1240 (Exxon App. at 1a-172a) *with Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970) and *State of Tennessee v. Dole*, 749 F.2d 331 (6th Cir. 1984).

Eldridge, 424 U.S. 319 (1976). In its motion to intervene, notice of appeal, brief on appeal and petition in this Court, PECO has consistently sought the opportunity to be heard to protect its restitutionary rights. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982); *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA) *cert. denied*, 459 U.S. 877 (1982). At each juncture it has been met with the argument that "it is impossible" for PECO to prove its claim—yet it has never been given the opportunity to do so in this proceeding. In sum, the Courts below and the opposition rely on the circular argument that PECO should not be permitted to make a claim because they have already determined that the claim will be unsuccessful.

POINT II

The District Court's decision to disburse the restitutionary funds for use in five limited programs constitutes an error of law and a departure from accepted standards of judicial procedure. The opposition contends that the petition should be denied because the Courts below have correctly held (1) that it is "impossible" to trace the victims of Exxon's massive overcharge, (2) that the ultimate consumers of oil were harmed, and (3) the injured consumers of oil will, in fact, be the beneficiaries of the state distributions. *See* States' Brief, at 12, 13 & 15; United States' Brief, at 29-31. This reasoning is hopelessly contradictory, and impossible to substantiate on this record. The more that the opposition repeats these "findings" the more evident is the miscarriage of justice in this case.

First, the District Court's finding that "Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims" (United States' Brief, at 29 *quoting* the District Court) cannot be harmonized with the finding that the overcharges were "borne by consumers of petroleum products." (States' Brief, at 7, *quoting* the District Court). If it is impossible to trace the victims of the overcharge, as the op-

position contends, it cannot also be determined that ultimate consumers were harmed by the overcharge.[3]

The reasoning of the District Court and the opposition has another fundamental flaw. If the Courts below are correct that the oil consuming public was harmed, the remedy they chose does not compensate the oil consumers. Rather, it diverts the overcharges to a small segment of the population and to the exclusion of injured utilities, truck operators, taxicab operators and others, all of whom can and should be compensated, if, in fact, consumers were harmed. *See City of Philadelphia, et al. v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971). In short, the irreconcilable "findings" and conclusions of the District Court must be corrected before they serve to justify diversion of other restitutionary funds from injured victims, to the Treasury, or the States, for use in narrow social programs.

It is now apparent that the District Court's fundamental assumption of the "impossibility" of tracing the harm—made without affording claimants any opportunity to present evidence or argument—is clearly erroneous and should not be left standing. Upon this assumption the opposition builds its entire argument against granting the Petitions. *See*, Brief of the United States, at 33-34 (an "attempt to identify the . . . victims of an overcharge . . . has reasonably been determined to be impossible") (an attempt to identify the victims would be "wasteful and ultimately futile"). Once the fallacy of this position is exposed, the opposition's argument collapses like the proverbial house of cards. The States and the United States rely on carefully edited portions of the Report of the Office of Hearings and Appeals filed in *In re DOE/Stripper Well Exemption Litigation*, MDL 378 (D. Kan.). An earlier version of the Report (the "Earlier Report") unedited by policymakers at

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3. If it is ultimately determined that no victim of the overcharge can be identified, distribution to the States or the Treasury would still be improper. As Judge Pointer noted in *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, if it is not possible to ascertain the victims of the overcharge, then the fund should be returned to the offending party. 669 F.2d, at 727 (Pointer, J. concurring in part and dissenting in part).

the Department of Energy who seek to obtain all crude oil overcharge funds for the United States Treasury, and until recently withheld from the parties to that litigation and the public,[4] makes it clear that victims of the overcharges can be readily ascertained. The findings in the Earlier Report are consistent with a long line of decisions by the Office of Hearings and Appeals finding that it is possible to trace overcharges and awarding restitution funds to consumer claimants in oil product cases. *See, e.g., Standard Oil Co./Indiana (Amoco)*, 10 DOE ¶85,048 (1982). Not until this case, and the adoption of a policy by the Department of Energy to use restitution funds for general Treasury receipts, has the government asserted that true restitution is "impossible" in overcharge cases.

The Earlier Report makes the following findings concerning utilities, such as PECO.

> For consumers of petroleum products who purchased directly from a refiner, including airlines, *public utilities*, the federal government, and other large purchasers that used petroleum products in their businesses, *the finding in this determination that refiners absorbed four percent of the impact of the MDL 378 overcharges means that the rest of the MDL 378 overcharges were passed through, and those consumers absorbed the remainder, or 96 percent of that impact.* Consequently,

4. The earlier version of the OHA Report, dated April 1, 1985 has been lodged by the petitioning refiners in No. 85-430 with the Clerk of this Court. The Report was ordered produced to the parties in the *Stripper Well Litigation* on the Motion of PECO and certain refiners and over the objection of the government that it was a privileged "draft." *See* Appendix B hereto. All of the petitioning consumers in this action—PECO, the Air Transport Association, the National Oil Jobbers Counsel, the gasoline retailers, National Freight, Inc., RJG Cab Co., Inc. and Sweeney are also parties in the *Stripper Well Litigation*. Pursuant to Judge Theis's referral to the office of Hearings and Appeals (OHA) of the question of who bore the overcharge, they presented evidence in support of their claims before the OHA. The Earlier Report recommends a claims procedure to make restitution to utilities and others. *See In re DOE/Stripper Well Exemption Litigation*, 578 F. Supp. at 595 (D. Kan. 1983).

> any refund mechanism adopted as a result of this fact-finding should permit consumers that purchased directly from refiners to file refund claims immediately . . . Consumers that file refund claims would need to demonstrate only the total amount of purchases made directly from a refiner during the three-year period 1978 by multiplying qualifying purchases by $0.001 . . . *[P]ublic utilities purchased approximately 66,332,700,000 gallons of product during the 1978-80 period.* EIA October 1984 Monthly Energy Review at 77 (January 1985). *This level of purchases would entitle the utilities to refunds totalling $66.3 million. . . .*" (emphasis supplied) (Earlier Report, at 84-86)

Even though the government's efforts to keep the Earlier Report—which completely undermines its "impossibility" argument—secret have failed, it persists in relying on the edited version to attempt to justify diversion of this, and over five billion dollars of other ESA restitution funds from injured consumers to the Treasury.

The facts surrounding the disclosure of the Earlier OHA Report, documented in the Supplemental Brief of Marathon, et al., No. 85-430, render the government's argument that it is impossible to trace the overcharge incredible.

POINT III

The opposition argues that the petitions should be denied because this case arises under a "now defunct price control program." Brief of the United States, at 28. The issues presented in this case are neither limited in application nor passe. Rather, the duties of the Courts in effecting restitution under the ESA, and the procedural rights of claimants to the nearly seven billion dollars of crude oil overcharge funds already created are important and vital issues, with far reaching application. While the regulations which gave rise to these funds have been phased out, little or no progress has been made toward fulfilling the restitutionary obligations attendant to the creation of the overcharge funds.

In its initial brief, PECO cited some of the numerous pending crude oil overcharge cases upon which the decisions in this case will have a profound effect.[5] Moreover, actions are still being brought by the Department of Energy under the regulations which will lead, in the future, to the collection of additional billions of dollars in overcharge funds. For example, on October 4, 1985, the Department issued a proposed remedial order ("pro") against Atlantic Richfield Company. This one pro involves approximately $500 million dollars. The case *sub judice* will be controlling precedent in all of these cases. The opposition's strategy is obvious—to convince this Court that the matter is not important enough to be reviewed and then to use the decisions of the Courts below as precedent to obtain all of the oil overcharge funds for the government to help balance the budget, to the exclusion of those who can, and have shown that they were harmed by crude oil overcharges.

It is therefore vital to the rights of all consumers entitled to restitution under the ESA that the Petitions for a Writ of Certiorari be granted.

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5. *See* PECO Petition, No. 85-440, at 7 n.2. In addition, the questions raised in this case apply to, *inter alia*, rate cases, and class action antitrust and securities cases where unclaimed portions of settlement funds remain after an initial distribution. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970); *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir. 1984); *In re Folding Carton Antitrust Litigation*, 1984-2 Trade Cas. ¶66,189 (7th Cir. 1984).

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition for a Writ of Certiorari, PECO respectfully requests the Court to grant its Petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,*	:	
v.	:	
EXXON CORPORATION, *Defendant.*	:	CIVIL ACTION NO. 78-1035
PHILADELPHIA ELECTRIC COMPANY, *Intervenor.*	:	

MOTION OF PHILADELPHIA ELECTRIC COMPANY FOR INTERVENTION

Philadelphia Electric Company (hereinafter "PECO"), pursuant to Rule 24 of the Federal Rules of Civil Procedure hereby petitions your Honorable Court for leave to intervene herein on its own behalf and as a representative party pursuant to Rule 23 of the Federal Rules of Civil Procedure, and in support of this Petition, avers as follows:

1. PECO, and the class it represents, seek to intervene to assert and protect their right to recover for overcharges of oil and oil products by defendant and other oil producers.

2. PECO is an investor-owned public utility corporation, organized under the laws of Pennsylvania, supplying electricity, gas and steam heat to consumers in Pennsylvania and Maryland.

3. PECO, and the class it represents, purchased oil and oil products from defendant Exxon Corporation and other refiners during the period January 1, 1975, through January 28, 1981, in their business of supplying electricity, gas and steam heat to their consumer customers.

4. The Department of Energy (hereinafter "DOE") brought suit against Exxon Corporation, alleging pricing practices in violation of 10 C.F.R. §212.72, in that defendant

treated the Hawkins Field Unit as a single "property", beginning in January, 1975. On August 22, 1982, the DOE filed a Motion for Summary Judgment against Exxon Corporation.

5. In a Memorandum Opinion filed March 25, 1983, this Honorable Court determined that Exxon had indeed violated the Unit Property Rule and federal regulations and overcharged its customers and those of other refiners more than $895 million plus interest. The unlawful excess price of crude oil sold by domestic refiners as a result of Exxon's Hawkins Field Unit prices and the operation of the "pass through" provision of the Entitlements Program caused unlawful increases in the cost of oil and oil products purchased by PECO and the class.

6. Due to Exxon's violation of the Unit Property Rule beginning in January, 1975, PECO and the class have been directly, significantly and substantially harmed, and are entitled to recover that portion of the overcharge attributable to their purchases.

7. The DOE relinquished its responsibility under Sections 209 and 210 of the Economic Stabilization Act to secure restitution for the injured parties and instead asked the Court to order payment of any funds recovered from defendant to the United States Treasury. In the Memorandum Opinion filed March 25, 1983, this Honorable Court granted DOE's request to have the funds paid to the United States Treasury.

8. PECO and the class are direct purchasers of oil, as set forth above, and have a direct and substantial interest in the overcharge fund as determined by this Court.

9. PECO and the class are situated so that disposition of this action may, as a practical matter, impair and impede their ability to protect their interests in the fund either in this Court or on appeal to the Temporary Emergency Court of Appeal, unless they are granted leave to intervene. PECO's interests are not adequately represented by the DOE or any other existing party to the litigation.

10. PECO is entitled to intervene in this action as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, PECO is entitled to intervene

pursuant to Rule 24(b) of the Federal Rules of Civil Procedure on the ground that its claim and the main action have questions of law and fact in common.

11. PECO incorporates by reference the attached Memorandum of Law as fully as if set forth herein.

DATED: May 10, 1983

Respectfully submitted,

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION	))))	M.D.L. 378

OPINION AND ORDER

Currently before the Court are the following motions: the refiner-plaintiffs' motion to compel production of documents; Philadelphia Electric Company's ("PECO's") motion to compel production of documents; and the Department of Energy's ("DOE's") motion for a protective order. The Court will consider the first two motions in tandem.

The refiner-plaintiffs have moved to compel the production of two documents: the original Office of Hearing and Appeals ("OHA") report dated April 1, 1985 (document P-1) and the Lorenz Memorandum (document P-2). In addition, PECO has moved for production of the following documents: drafts of a letter by the Administrator of the Economic Regulatory Administration to Congressman John Dingell (documents P-3A, P-3B, P-3C and P-3D); drafts of a letter from the Secretary of Energy, John Herrington, to Governor George Wallace (documents P-4A, P-4B, P-4C, P-4D, P-4E and P-4F); drafts of a letter from John Herrington to Congressman Dingell (documents P-5A, P-5B, P-5C and P-5D); a letter from the ERA Administrator to Theodore Garrish, General Counsel for the DOE (document P-6); a preliminary draft of a decision and order by the OHA announcing a date for a hearing and the procedure to be used to receive evidence on the matter referred to the DOE by this Court (document P-7); copies of correspondence by various DOE officials to Congressman Dingell (documents P-8A, P-8B, P-8C, P-8D, P-8E, P-8F, P-8G, P-8H, P-8I and P-8J); and a memorandum from Herrington to the ERA Administrator (document P-9). The above documents

were submitted for *in camera* inspection, and the Court has carefully examined the documents and is prepared to rule on their discoverability.

With respect to the first two documents, the draft OHA report and the memorandum from Milton Lorenz, Special Counsel for the DOE's Economic Regulatory Administration, to George Breznay, Director of the OHA, the DOE contends that the documents are protected by the deliberative process privilege. In an earlier opinion in the instant case, this Court set forth the general rules regarding the predecisional or deliberative process privilege:

> The privilege for official information is narrow. *Kincy v. Mitchell*, 67 F.R.D. 1, 14 (S.D. N.Y. 1975). The privilege does not attach to purely factual matter. *Jabara v. Kelley*, 75 F.R.D. 475, 495 (E.D. Mich. 1977). The privilege is intended to exempt from scrutiny "advisory opinions and recommendations submitted for consideration in the performance of decision and policy-making functions." *Freeman v. Seligson*, 405 F.2d 1326, 1339 (D.C. Cir. 1968). The privilege is based on the need to encourage candor in exchanges of views within the executive branch. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-25 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (1967), *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967). "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decision-making process." *United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The privilege is not absolute, however. The privilege is "qualified" or "conditional." *Kincy v. Mitchell*, *supra*, 67 F.R.D. at 11; *Wood v. Breier*, 54 F.R.D. 7, 12 (E.D. Wis. 1972). The policies which support the upholding of the privilege must be balanced by the obligation of this Court to do justice and the belief, as embodied in the federal discovery rules, that full disclosure leads more frequently to just ends. Any claim of privilege should be

> carefully scrutinized, "for by invoking the privilege the case before the court may become a mockery with 'half-informed litigants who sometimes get justice, if at all, by accident' . . ." *Wood v. Breier, supra*, 54 F.R.D. at 11, quoting, *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964). The resolution of these competing policies has been obtained by balancing, on an ad hoc basis, the individual need for the materials against the harm caused by their disclosure. Wright and Miller, Fed. Prac. and Proc. § 2019. Disclosure may be ordered after a determination that release of the material would not be injurious to the consultative functions of government. *Kaiser Aluminum & Chemical Corporation v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958); *Olson Rug Company v. N.L.R.B.*, 291 F.2d 655, 661 (7th Cir. 1961).

Dk. no. 79, pp. 11-12.

The DOE contends that the first draft of the OHA report is protected because it contains the personal opinion of the writers rather than the policy of the agency. To the extent that agency employees are inevitably the ones to prepare any sort of report, this alone cannot create a claim of deliberative process privilege or else all agency paperwork would be protected. Next, the DOE argues that the report is a draft, which, by its very nature is predecisional and deliberative. *See Exxon Corp. v. Department of Energy*, 585 F. Supp. 690 (D.D.C. 1983). Refiner-plaintiffs respond that the draft would have been the final report, and therefore outside the scope of the privilege, had the DOE not interfered with the OHA process. In a previous order, this Court held that while "consultation by the OHA with senior policy makers of the DOE would be appropriate," the Court "did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution . . ." *In Re Department of Energy Stripper Well Exemption Litigation*, 608 F. Supp. 1104, 1107, 1108 (D. Kan. 1985). In light of this Court's previous ruling, the Court finds that the refiner-plain-

tiffs' charge of undue influence is serious. Indeed, Congressman Dingell, who reviewed both the original and the final reports, commented in strong language:

> OHA had been beaten into submission by the [DOE's] "internal" [review] process ... Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

Dk. no 681, Exh. A.

The Court is not persuaded that the release of the original report would inhibit agency personnel from expressing their views in the future, as the DOE claims. The present set of circumstances differs from other cases in which the deliberative process privilege has been successfully claimed, *see, e.g., Burke Energy Corp. v. Department of Energy,* 583 F. Supp. 507 (D. Kan. 1984), in that the OHA in this case operated virtually in the capacity of a special master to this Court. This Court referred to the OHA "only the factual question concerning the particularized impact of the overcharges ... The Court, not the DOE, will decide where the funds go." *In re Department of Energy Stripper Well Exemption Litigation,* 578 F. Supp. 586, 596 (D. Kan. 1983). Thus, the draft document does not reflect the policy of the agency in the sense that the deliberative process was intended to protect. *See Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980). Therefore, the Court holds that the reasons for the deliberative process privilege do not apply with respect to the original OHA draft, and whatever interests remain are outweighed by the need for disclosure.

The Lorenz Memorandum is claimed by the DOE to be protected by the predecisional and investigative privileges. On August 31, 1984, George Breznay, OHA Director, wrote a memo to Rayburn Hanzlik, ERA Administrator, seeking factual information about computer capabilities to assess overcharges. This memo was placed in the administrative record. On September 19, 1984, Milton Lorenz, ERA Special Counsel, responded regarding "ERA Capability for Calculating Re-

finer Overcharges on a Transactional Basis." The substance of the Lorenz Memorandum was deleted from the administrative record.

The DOE contends that the Memorandum contains Lorenz' personal views regarding the use of computer programs. The Court explained above the circularity of this type of argument. Moreover, the Court has carefully examined the Lorenz Memorandum and found that it is not the sort of document that "is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

In addition, the DOE claims that the investigative privilege applies to the memorandum, since the document discloses in general terms the techniques employed by the ERA in fulfillment of its law enforcement objectives. The investigatory privilege generally protects against "the public disclosure" of material that might "harm law enforcement efforts." *United States v. Winner,* 641 F.2d 825, 831 (10th Cir. 1981). The DOE suggests that the law enforcement efforts which would be hampered are some refiner-pricing cases currently being prosecuted by the ERA. The Court has reviewed the Lorenz Memorandum and finds that any references to investigative techniques are so obvious that they are certainly already known by those subject to prosecution. Since the Lorenz Memorandum is a response to a specific request for factual information and because the concerns the Court had with regard to the original OHA report apply with equal force here, the Court shall order the production of the Lorenz Memorandum.

Regarding the remainder of the documents requested to be produced (P-3 through P-9), the Court finds that production is unnecessary in light of the Court's above ruling disclosing the substantive documents, P-1 and P-2. Moreover, documents P-3 through P-9 do involve the transmission of more personal thoughts. Finally, the Court's examination of these documents convinces it that the documents contain no rele-

vant information not already discoverable through the original OHA report and the Lorenz Memorandum.

The Court now turns to the DOE's motion for a protective order. On September 24, 1985, this Court signed a temporary protective order serving "to bar the deposition testimony of present and former DOE employees and quash the subpoenas served until such time as PECO has convinced the Court it should lift the protective order." Dk. no. 671, p. 2. PECO has noticed the depositions of the following groups of people: the custodians of records of the DOE and OHA; the OHA adjudicators; certain DOE officials, such as John Herrington, the Secretary of Energy; and DOE litigators, Thomas Newkirk, Larry Ellsworth and Marcia Sowles. The Court agrees with the DOE that this effort to probe the minds of government officials and personnel is barred by the deliberative process privilege. The Court has already rejected PECO's request that all consultations between OHA and DOE be made on the record. *Stripper Well Exemption Litigation*, 608 F. Supp. at 1107. More importantly, internal agency discussions are just the type of "honest and frank communication" likely to be stifled if the parties are subject to searching cross-examination. *Coastal States Gas Corp.*, 617 F.2d at 866. None of the cases cited by PECO supports the sort of interrogatory rummaging that PECO wishes to conduct. Therefore, the Court shall not lift the protective order entered on behalf of the DOE.

IT IS THEREFORE ORDERED that the DOE's motion for a protective order is hereby granted.

IT IS FURTHER ORDERED that the refiner-plaintiffs' and PECO's motion to compel production of documents P-1 and P-2, the original OHA report and the Lorenz Memorandum, is hereby granted. These documents shall be released two weeks from the date of this Order.

IT IS FURTHER ORDERED that PECO's motion for the production of documents P-3 through P-9 is hereby denied.

At Wichita, Kansas, on this *26th* day of *November*, 1985.

/s/ _____
United States District Judge